(CLO (3)

No. 09-1128

CLERK, U.S.
FILED
APR 29 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DANIEL J. SEGAL, on behalf of himself, his minor children and all others similarly situated,
Petitioner,

v.

FIFTH THIRD BANK, N.A., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

DAVID A.P. BROWER
Counsel of Record
BROWER PIVEN
A Professional Corporation
488 Madison Avenue
Eighth Floor
New York, New York 10022
(212) 501-9000
brower@browerpiven.com

Counsel for Petitioner

April 29, 2010

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D C 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. The Original Complaint Is Irrelevant 3

II. The Petition in *Kutten* Was Premature 4

III. The Holding in *Green* Was Not Superseded by *Dabit's* Narrow Holding 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Beckett v. Mellon Investor Servs., LLC.,
No. 06-36044, 2009 U.S. App. LEXIS 10335
(9th Cir. May 14, 2009) 4

Blair v. Henry Filters, Inc.,
505 F.3d 517 (6th Cir. 2007) 3

Breakaway Solutions, Inc. v. Morgan Stanley & Co.,
No. 19522, 2004 Del. Ch. LEXIS 125
(Del. Ch. Aug. 27, 2004) 7

In re Charles Schwab Corp. Sec. Litig.,
257 F.R.D. 534 (N.D. Cal. 2009) 5, 6

Cheatham v. Kentucky Lottery Corp.,
No. 3:07-391, 2008 U.S. Dist. LEXIS 1391
(W.D. Ky. Jan. 4, 2008) 6

County of Riverside v. McLaughlin,
500 U.S. 44 (1991) 3

Dluhos v. Floating & Abandoned Vessel,
162 F.3d 63 (2d Cir. 1998).....3, 4

Fishback v. Memory Gardens Mgmt. Corp.,
No. 1:08-0216, 2008 U.S. Dist. LEXIS 38626
(S.D. Ind. May 12, 2008) 6

Gavin v. AT&T Corp.,
464 F.3d 634 (7th Cir. 2006) 10

Green v. Ameritrade,
279 F.3d 590 (8th Cir. 2002) 2, 9, 10

Kutten v. Bank of America,
530 F.3d 669 (8th Cir. 2008), *cert. denied*,
Arnold v. Bank of America, N.A.,
129 S. Ct. 598 (Nov. 17, 2008) 1, 2, 4, 5, 8, 9

LaSala v. Bank of Cyprus Pub. Co.,
510 F. Supp. 2d 246 (S.D.N.Y. 2007) 6, 7

LaSala v. Bordier Et Cie,
519 F.3d 121 (3d Cir. 2008) 10

LaSala v. Lloyds TSB Bank,
514 F. Supp. 2d 447 (S.D.N.Y. 2007) 7

In re Lord Abbett Mutual Funds Fee Litig.,
553 F.3d 248 (3d Cir. 2009) 4

Merrill Lynch, Pierce, Fenner & Smith v. Dabit,
547 U.S. 71 (2006) ..... *passim*

Kutten v. Bank of America,
No. 06-0937, 2007 U.S. Dist. LEXIS 63897
(E.D. Mo. Aug. 29, 2007) 9

Parry v. Mohawk Motors of Mich., Inc.,
236 F.3d 299 (6th Cir. 2000) 3

Paru v. Mutual of American Life Ins. Co.,
No. 04-6907, 2006 U.S. Dist. LEXIS 28125
(S.D.N.Y. May 10, 2006) 7

Proctor v. Vishay Intertechnology, Inc.,
584 F.3d 1208 (9th Cir. 2009) 4, 10

Ring v. AXA Fin., Inc.,
483 F.3d 95 (2d Cir. 2007) 10

Sante Fe Indus., Inc. v. Green,
430 U.S. 462 (1977) 9

Siepel v. Bank of America, N.A.,
239 F.R.D. 558 (E.D. Mo. 2006) 8

Siepel v. Bank of America, N.A.,
526 F.3d 1122 (8th Cir. 2008) 4, 8, 9

STATUTES AND RULES

Securities Act of 1933,
15 U.S.C. §77a *et seq.* 8

Securities Exchange Act of 1934,
15 U.S.C. §78a *et seq.* 8

Securities Litigation Uniform Standards Act of 1998,
15 U.S.C. §78bb(f)(1) ..... *passim*

Sup. Ct. R. 10 5

Sup. Ct. R. 15.6 1

Pursuant to Supreme Court Rule 15.6, Petitioner Daniel J. Segal, on behalf of himself, his minor children, Alex J. Segal and Graham H. Segal, and all others similarly situated, files this Reply to correct misstatements of fact and law and to address the new points raised in Respondents' Brief in Opposition.[1]

INTRODUCTION

Respondents' arguments in their Opposition do not undermine any of the compelling reasons Petitioner put forth for granting his Petition for a Writ of Certiorari ("Petition"), but instead reinforce Petitioner's argument that this case is an appropriate vehicle for this Court to address the exceptionally important and recurring question of the preclusive scope of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §78bb(f)(1) ("SLUSA") and resolve the ever-widening circuit split.

First, Respondents attempt to distract the Court from the critical question presented by improperly referring to the original complaint in this case "to reveal the true nature of the claims asserted." Opp. at 3 n.1. That complaint, however, was superseded by the Amended Class Action Complaint ("Amended Complaint") before any rulings below, and thus, has no relevance to any issue before this Court. Second, Respondents claim that the Petition should be denied simply because this Court declined to review a "similar" case eighteen months ago. *See* Opp. at 2, 13 (citing *Kutten v. Bank of America*, 530 F.3d 669 (8th

---

[1] Respondents are Fifth Third Bank, N.A. and its corporate parent, Fifth Third Bancorp. Respondents' Brief will be referred to as the "Opposition" or "Opp."

Cir. 2008), *cert. denied, Arnold v. Bank of America, N.A.*, 129 S. Ct. 598 (Nov. 17, 2008)). However, not only are the facts of *Kutten* distinguishable from the instant case, but, given the then nascent development of the law among the circuits, the *Kutten* petition was also premature. Since denial of the *Kutten* petition, at least three circuits have issued additional conflicting decisions regarding the preclusive scope of SLUSA. Furthermore, Respondents' argument that the Eighth Circuit's decision in *Kutten* is consistent with the Sixth Circuit's decision in this case simply provides further support for granting the Petition here because the Eighth Circuit, in addition to the Sixth Circuit, is clearly split with several other circuits on the preclusive scope of SLUSA presented by this Petition.

Additionally, Respondents' contention that the holding in *Green v. Ameritrade*, 279 F.3d 590 (8th Cir. 2002), was superseded by *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71 (2006), is misleading because only the part of the *Green* decision finding holders were not precluded under SLUSA was overruled by *Dabit*, and not the portion of the *Green* decision requiring reliance on a misrepresentation or omission for SLUSA preclusion. As Petitioner has made clear, in accord with *Green*, *Dabit* and decisions interpreting *Dabit*, have held that for the claim to be precluded by SLUSA, a plaintiff must still be induced to some action or inaction by a misrepresentation or omission.

Therefore, Respondents' arguments and citations to new authority only strengthen Petitioner's position that in the four years since *Dabit*, based on inconsistent interpretations of SLUSA and *Dabit*,

courts of appeals and district courts have widely divided on whether SLUSA precludes traditional state law claims that are not premised on any misrepresentation, omission, or other deceptive conduct. Due to the varying irreconcilable approaches by the courts of appeals used in analyzing the preclusive effect of SLUSA, which has led to confusion and disarray, this Court must intervene to protect Congress' express goal with SLUSA of applying uniform standards to deceptions in connection with transactions in securities.

ARGUMENT

I. The Original Complaint Is Irrelevant

In the Petition, Petitioner began the "Statement of the Case" by describing the allegations in the Amended Complaint, the only pleading that is relevant to the decisions in the Sixth Circuit and the District Court. Respondents, however, improperly claim that "Petitioner seeks to downplay or hide the original complaint filed in this case," Opp. at 3 n.1, ignoring the settled rule that "[w]hen plaintiff files [an] amended complaint, [the] new complaint supersedes all previous complaints and controls [the] case from that point forward." *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000) (citation omitted); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 48 (1991) (stating that the second amended complaint was the operative pleading); *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 522 (6th Cir. 2007) (finding the operative complaint to be the amended pleading); *Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63, 68 (2d Cir. 1998) ("[I]t is well established that an amended complaint ordinarily supersedes the original, and renders it of

no legal effect.") (internal citations and quotations omitted). Therefore, Respondents' suggestion that Petitioner attempts to "downplay or hide" the original complaint is disingenuous, as the original complaint is completely immaterial to any of the issues before this Court or the lower courts.

II. The Petition in *Kutten* Was Premature

Respondents argue that the Petition should be denied because this Court found "no compelling reason to review the Eighth Circuit's decision in *Kutten*," Opp. at 13, and that *Kutten* and the Eight Circuit's later decision in *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008), involved claims "nearly identical" to those of Petitioner here.

However, the petition in *Kutten* was premature because the split in the circuits regarding the scope of SLUSA preclusion had not yet sufficiently manifested itself. Since this Court denied the petition in *Kutten*, at least three additional circuits – the Third, Sixth, and Ninth (as well as numerous district courts) – have issued divergent decisions on SLUSA's preclusive scope, further widening the split. *See* App. 1a-11a;[2] *Beckett v. Mellon Investor Servs., LLC.*, No. 06-36044, 2009 U.S. App. LEXIS 10335 (9th Cir. May 14, 2009); *In re Lord Abbett Mutual Funds Fee Litig.*, 553 F.3d 248 (3d Cir. 2009); *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208 (9th Cir. 2009). Thus, Respondents' contention that "[o]ther than cases adding to the list of courts that have found such claims preempted under SLUSA, no significant legal developments have taken place since the Court

---

[2] References to the Appendix submitted with the Petition will be to "App."

denied the petition for certiorari in *Kutten*," Opp. at 13, is simply incorrect.

Further, Respondents' citation to two Eighth Circuit cases that are consistent with each other – *Kutten* and *Siepel* – and several district court cases is inconsequential, as this Court is concerned with splits between the circuits. *See* Sup. Ct. R. 10 ("The following . . . indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ."). Moreover, all of Respondents' cited authorities are inapposite because, unlike the facts before the Sixth Circuit, they all involve purchasers, sellers, or holders of securities who were induced to purchase, sell, or hold such securities by defendants' misstatements and/or omissions.

Nevertheless, Respondents' citations to the district court decisions to support their position that the Sixth Circuit applied "settled precedent with respect to SLUSA," Opp. at 12, actually furthers Petitioner's argument that the Petition should be granted. The district court decisions demonstrate that the lower courts are in disarray over the proper analysis under SLUSA, which is to be expected, given the varying approaches of the circuit courts on similar sets of facts. That lack of uniformity in the application of SLUSA is evidenced by the fact that for every case that Respondents can cite, Petitioner can cite a case with similar facts with a contradictory result. *See, e.g.*, *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 551 (N.D. Cal. 2009) (denying dismissal under SLUSA, holding that,

although the complaint contained allegations of misrepresentations, the state law claims were not "in substance predicated on misrepresentations or omissions" because they were not premised on defendant's failure to disclose the fund's change in concentration policy, but on the change violating its contractual and fiduciary duties to plaintiff); *Fishback v. Memory Gardens Mgmt. Corp.*, No. 1:08-0216, 2008 U.S. Dist. LEXIS 38626, at *2-3 (S.D. Ind. May 12, 2008) (finding SLUSA did not preempt the state law claims, because "[t]he only alleged transactions in 'covered securities' were not deceptive and were merely incidental to the scheme. . . . Extending SLUSA preemption to plaintiff's claims would lose sight of the language and purpose of SLUSA. Extending preemption to these claims also would go a long way toward allowing SLUSA to swallow a broad swath of state law class actions well beyond the scope of federal and state securities laws, while denying victims any effective remedy at all for serious wrongs. That is not what Congress legislated or intended."); *Cheatham v. Kentucky Lottery Corp.*, No. 3:07-391, 2008 U.S. Dist. LEXIS 1391, at *8 (W.D. Ky. Jan. 4, 2008) ("KLC's alleged misrepresentations and omissions had nothing to do with the trading of any particular security and any misrepresentation or omission by KLC did not affect the value of the KLC Plan, but merely involved the relationship between KLC and its employees. . . . Although SLUSA's scope is broad, it is not unlimited. Accordingly, the court does not find SLUSA's 'in connection' requirement to be met in this case.") (citations omitted); *LaSala v. Bank of Cyprus Pub. Co.*, 510 F. Supp. 2d 246, 272-73 (S.D.N.Y. 2007) (finding that SLUSA was not meant to preempt every

kind of fraud that has something to do with securities, and "[i]f merely making allegations of fraud somewhere in the complaint were sufficient to bring the case within the reach of SLUSA, a class action complaint for commission of an environmental tort, that also alleged that the company fraudulently altered its books and thereby deceived shareholders, would be preempted, even if the claim against the defendant had nothing to do with securities fraud"); *LaSala v. Lloyds TSB Bank*, 514 F. Supp. 2d 447, 479 (S.D.N.Y. 2007) ("The allegations concerning defendant's conduct . . . are simply too far removed from a securities transaction to satisfy SLUSA's 'in connection with' requirement."); *Paru v. Mutual of American Life Ins. Co.*, No. 04-6907, 2006 U.S. Dist. LEXIS 28125, at *13-14 (S.D.N.Y. May 10, 2006) (finding that the complaint "does not contain a single allegation of a misrepresentation or omission of material fact made by defendant which could trigger SLUSA preemption" and that "[e]ven looking beyond the face of the Complaint to the substance of plaintiff's allegations, it is clear that plaintiff's claim is not based, either explicitly or implicitly, on any misstatements or omissions," and [t]herefore, plaintiff's state law breach of fiduciary duty claim is not preempted by SLUSA"); *Breakaway Solutions, Inc. v. Morgan Stanley & Co.*, No. 19522, 2004 Del. Ch. LEXIS 125, at *39 (Del. Ch. Aug. 27, 2004) ("Because Breakaway has not alleged 'misrepresentation or omission of a material fact' or the use of a 'manipulative or deceptive device,' the state law claims asserted in this action have not been preempted by SLUSA, and the Defendants are not entitled to dismissal under SLUSA.").

Moreover, the facts of *Siepel* and *Kutten* are distinguishable from the facts here. The complaints in those cases expressly alleged fraud and were predicated on the trustees' alleged deceptions of beneficiaries. In *Siepel*, in addition to their breach of fiduciary duty claims, plaintiffs alleged that defendants violated their state law duty of candor, *see Siepel v. Bank of America, N.A.*, 239 F.R.D. 558, 567 (E.D. Mo. 2006), and the federal securities laws under the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* and the Securities Act of 1933, 15 U.S.C. §77a *et seq.* *Siepel*, 526 F.3d at 1124. Indeed, the *Siepel* plaintiffs conceded that their complaint contained allegations of misrepresentations and omissions by the bank underpinning their claims. *See id.* at 1126.

In *Kutten*, 530 F.3d 669, the same Eighth Circuit found that the case was indistinguishable from *Siepel*, stating that:

> We agree with the district court that the Appellants failed to distinguish their case from *Siepel*. Whatever the distinction between "deceiving" and "failing to be honest," or between "omitting a material fact" and "failing to disclose," it does not bear on whether SLUSA preempts the claim containing those allegations. In this case, the district court correctly found that without allegations of deceptive and misleading conduct, the Appellants' complaint was empty of any non-preempted class action claims.

See id. at 671.

Further, the complaint in *Kutten* specifically alleged that defendants provided false and misleading notices about fees and expenses and other deceptive information about the investments in the fiduciary accounts, *see* No. 06-0937, 2007 U.S. Dist. LEXIS 63897, at *3-4 (E.D. Mo. Aug. 29, 2007), and that defendants did not disclose certain material facts. *See id.* at *5. Indeed, the *Kutten* plaintiffs conceded that "the breach of the fiduciary duty to disclose diversion of trust assets or facts relevant to whether the bank has committed multiple breaches of duty" was the issue in the case and made clear that they were "challeng[ing] [the] failure to disclose." *Id.* at *11-12 (internal citation omitted).

Therefore, neither *Kutten* nor *Siepel* squarely address the distinction between claims premised on misrepresentations and omissions, as in those cases, and claims that are not premised on any deceptive misconduct, like those of Petitioner here.

III. The Holding in *Green* Was Not Superseded by *Dabit's* Narrow Holding

In response to Petitioner's citation to *Green*, 279 F.3d 590,[3] in support of the requirement that detrimental reliance on a misrepresentation or

---

[3] Respondents seek to suggest a sinister motive behind Petitioner's unintentional short hand use of the case name *Green*, when they intended to cite to the Eighth Circuit's *Green v. Ameritrade*, 279 F.3d 590 (8th Cir. 2002), rather than *Sante Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977). *See* Opp. at 15 n.4. Petitioner did, however, provide the correct Federal Reporter citation to his citation to the Eighth Circuit's *Green* opinion, which demonstrates no deception was intended. Petitioner apologizes for any confusion this may have engendered.

omission must be alleged for a claim to be precluded by SLUSA, Respondents incorrectly argue that "*Green* was superseded by *Dabit*." *See* Opp. at 16-17. However, as Petitioner pointed out, *Dabit* only overruled the portion of the holding in *Green* dealing with excluding holders from the scope of SLUSA, the primary issue addressed by *Dabit*. The remainder of the *Green* decision is still valid and has been relied on for its interpretation of SLUSA's requirements. *See Gavin v. AT&T Corp.*, 464 F.3d 634, 639 (7th Cir. 2006). In fact, even in *Dabit*, "the brokers allegedly ***relied*** on the analysts' reports in advising their investor clients and in deciding whether or not to sell their own holdings; and the clients and brokers both continued to hold their stocks long beyond the point when, had the truth been known, they would have sold." 547 U.S. at 75 (emphasis added). Moreover, Petitioner has cited post-*Dabit* circuit decisions that have held that for SLUSA to preclude the claim, the plaintiff must still be induced by a misrepresentation or omission to purchase, sell, or hold a security. *See Proctor*, 584 F.3d at 1221-23; *LaSala v. Bordier Et Cie*, 519 F.3d 121, 128-29, 141 (3d Cir. 2008); *Ring v. AXA Fin., Inc.*, 483 F.3d 95, 101 (2d Cir. 2007); *Gavin*, 464 F.3d at 639-40; *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 877, 879-80 (8th Cir. 2006).[4]

---

[4] Respondents question Petitioner's reliance on *Sofonia*. Opp. at 17. However, even without its citation to *Green*, 279 F.3d 590, the Eighth Circuit in *Sofonia* still held that the "in connection with" element was only met because "[t]he crux of Sofonia's complaint is that Appellees made false statements in the PIB to ***induce*** policyholders to approve the demutualization and that he and the other putative class members did not receive fair value when they exchanged their membership interests for shares of PFG common stock. . . . Any fraudulent statements allegedly made by Appellees to ***persuade***

Therefore, contrary to Respondents' assertion, there is a conflict among the circuits on whether detrimental reliance on misrepresentations or omissions is necessary for SLUSA preclusion, as well as on the other fundamental issues discussed fully in the Petition. These issues must be resolved by this Court to establish uniform standards and ensure that the fate of the claims does not depend on the jurisdiction where they are brought.

CONCLUSION

For these reasons and the reasons set forth in the Petition, a writ of *certiorari* should be granted.

April 29, 2010

Respectfully submitted,

DAVID A.P. BROWER
Counsel of Record
BROWER PIVEN
A Professional Corporation
488 Madison Avenue
New York, New York 10022
(212) 501-9000
brower@browerpiven.com

Counsel for Petitioner

---

policyholders to approve this transaction most assuredly were made 'in connection with' the policyholders' purchase of PFG common stock. The District Court did not err in reaching this conclusion." *See Sofonia*, 465 F.3d at 879-80 (emphasis added).